United States District Court
for the
District of Massachusetts

HECTOR PINEIRO, Plaintiff v. GARY GEMME, WORCESTER CHIEF of POLICE and the CITY OF WORCESTER, Defendants	)))))))))	Civil Action No. 4-10-CV-40262-FDS

Defendants' Memorandum of Reasons in Support of Their Motion To Dismiss or Stay This Proceeding on Abstention Grounds Due to the Pendency of a State Action on the Same Matter

Now come the Defendants Gary Gemme, Worcester Chief of Police, and the City of Worcester, by and through their undersigned counsel, and hereby respectfully submit this memorandum of law in support of their motion to either dismiss pursuant to Fed. R. Civ. P. 12(b)(1), or enter an order staying this action, due to the pendency of a proceeding in state court involving this same matter, Hector Pineiro vs. City of Worcester – Chief of Police, Commonwealth of Massachusetts, District Court Department, Docket Number 2010-62CV003795.

Plaintiff has filed a Complaint seeking a declaration that the Defendants' issuance of a license to carry a firearm with certain restrictions violates his rights under the Second Amendment and the Equal Protection Clause. The Plaintiff seeks injunctive and compensatory relief under 42 U.S.C. § 1983 on the basis of the same claims.

Simultaneous with the filing of this Complaint, the Plaintiff initiated an action in the state court of competent jurisdiction appealing the issuance of the same license to carry a firearm. (Complaint ¶ 113)(See also Complaint Exhibit 9, a copy of Plaintiff's state court "Petition for Judicial Review of Refusal to Issue License to Carry a Firearm"). The Plaintiff has a hearing in the state district court on April 8, 2011. (Complaint ¶ 114).

Under the seminal case of Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), a federal court has authority to abstain from exercising jurisdiction where the resolution of a federal constitutional issue may be rendered irrelevant by the determination of a predicate state-law question. See, Martin v. Creasy, 360 U.S. 219, 79 S.Ct. 1034, 3 L.Ed. 1186 (1959) ("Reflected among the concerns which have traditionally counseled a federal court to stay its hand are … the premature determination of constitutional questions." Id., 224, 1037). In finding that Pullman abstention was appropriate in a case involving a challenge to the application of state election laws to the ballot access rights of a presidential candidate from a political party not recognized by Massachusetts law, the First Circuit recently noted:

> "[W]e are also mindful of the Supreme Court's sage counsel that among the cases that call most insistently for abstention are those in which the federal constitutional challenge turns on a state statute the meaning of which is unclear under state law." Barr v. Galvin, 626 F.3d 99 (1st Cir. 2010)(internal quotations removed), citing Harris County Commissioners Court v. Moore, 420 U.S. 77, 95 S.Ct. 870, 43 L.Ed.2d 32 (1975).

In Harris County, the Supreme Court applied the Pullman Abstention Doctrine to reverse and remand a judgment that a Texas statute involving justices of the peace and constables violated the Due Process and Equal Protection Clauses, saying that the District Court should have abstained: "Where there is an action in state court that will likely resolve the state-law questions underlying the federal claim, we have regularly ordered abstention." Id., 83.

The Pullman Abstention Doctrine as articulated in the Martin v. Creasy and Harris County cases fits four-square on the case at bar. The state court case filed by the Plaintiff involves the same facts and circumstances involved in this case: the issuance of a state license to carry a firearm with a restriction not requested by the applicant. State law, M.G.L. c. 269 § 10, with certain exceptions not relevant here, prohibits the carrying of a firearm in Massachusetts without a license issued under M.G.L. c. 140 § 131. Subsection (d) of section 131 authorizes the Defendant Gary Gemme as the Chief of Police of the Defendant city of Worcester, to issue licenses to carry firearms.[1] The second paragraph of subsection (f) of said section 131 authorizes any "applicant … aggrieved by a denial, revocation or suspension of a license …[to]… file a petition to obtain judicial review in the district court having jurisdiction…". The Plaintiff has exercised his right under state law to obtain judicial review of the issuance of that license. That review may well result in the removal of the unwanted restriction or in some other resolution which would resolve the constitutional claims raised by the Plaintiff in this action.

Additionally, the Plaintiff has raised a novel question of state law because he is not challenging the denial, revocation or suspension of a state firearms license. Rather, having been issued a license to carry a firearm for all lawful purposes under state law, he is challenging the inclusion of a local restriction on that license. This is an unsettled area of state law. If the Plaintiff receives a judgment under state law that the inclusion of the condition was not warranted or authorized under state law, or if the case reaches some other resolution acceptable to the Plaintiff, then he will possess the license to carry he desires and there will be no issues under the Second Amendment or Equal Protection Clause of the Constitution. At minimum, a state court decision adverse to the Plaintiff should provide this court with a well-defined statement of state law upon which to evaluate the Plaintiff's constitutional claims.

Therefore, on the grounds that the Plaintiff's federal constitutional claims may be rendered irrelevant by the determination of a predicate state-law question and that a federal court should not engage in the premature determination of constitutional questions, the and Defendants respectfully submit that Pullman abstention is necessary and proper in this case at this time and urge the court either to dismiss this case or to enter an order staying this action until final judgment is entered in the state court proceeding, Hector Pineiro vs. City of Worcester – Chief of Police, Commonwealth of Massachusetts, District Court Department, Docket Number 2010-62CV003795.

[1] While section 131 refers to a "licensing authority," an earlier section, M.G.L. § 121, defines "licensing authority" as the local chief of police.

GARY GEMME, and
CITY OF WORCESTER,

By their attorney,

/s/ David M. Moore
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CERTIFICATE OF SERVICE

I, David M. Moore, hereby certify that on this 24th day of January, 2011, I served the within Defendants' Memorandum of Law in Support of their Motion to Dismiss or Stay on Abstention Grounds upon Plaintiff by providing a copy of the same to Plaintiff's counsel of record, Hector E. Pineiro, via the United States District Court's electronic notification system.

/s/ David M. Moore
David M. Moore
City Solicitor